BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 75070-s76L BY MARK E. LEATZOW

FINAL ORDER

* * * * * * *

The Proposal for Decision (Proposal) in this matter was entered on August 27, 1993. Objector United States Department of Interior, Bureau of Indian Affairs (Objector) filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting a conditional Beneficial Water Use Permit to Mark E. Leatzow to appropriate 18 gallons per minute up to 0.25 acre-feet per year of water from Little Bitterroot Lake, specifically 18 gallons per minute up to 0.20 acre-feet per year for domestic purposes and up to 0.05 acre-feet per year for watering stock. The diversion would be by means of a pump in Tract No. 2-7 of Government Lot 14 (generally in the SE\se\se\se\) of Section 6, Township 27 North, Range 24 West, Flathead County, Montana. The place of use for both purposes would be in Tract No. 2-7 of Government Lot 14 (generally in the SE\se\se\se\) of Section 6, Township 27 North, Range 24 West, Flathead County, Montana. The period of appropriation and period of use would be January 1 through December 31 of each year. The priority date would be July 2, 1990.

For this review, the Department must accept the Proposal's Findings if the Findings were based upon competent substantial

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evidence and the proceedings on which the Findings were based, complied with essential requirements of law. Mont. Code Ann. \$ 2-4-621(3) (1993) and Mont. Admin. R. 36.12.229 (1991).

The Objector first excepts to the "Exhibits" provision in the Proposal. The Objector would reword the provision but has not identified how changing the provision would have any effect on the decision. The Department believes this provision adequately describes the Exhibits and those portions of other cases officially noticed by the Hearing Examiner. The provision will not be changed.

Objector has excepted to several of the findings of fact in the Proposal. Objector's exceptions to the findings are editorial and clerical rather than substantive. Although Objector would have the Department word the findings differently, the purpose of this review is to correct substantive errors in, as opposed to editing, the Proposal. As Findings of Fact 9, 10, 11, 12, 13, 14, 15, and 17 in the Proposal are supported by substantial competent evidence, they will not be modified or amended.

Objector's exceptions to Conclusions of Law 1 and 10 are also editorial and non-substantive in that they target supporting discussion rather than essential conclusions. Changing the discussions as suggested by Objector would not alter the conclusions that the Department has jurisdiction, that Applicant's unpermitted use of the water is not grounds for denying the permit, and that the data obtained from prior use



even though that use may have been illegal, is evidence in these proceedings. Since the Department agrees with these conclusions of law, they will not be changed for the Final Order.

Objector excepts primarily to Conclusions of Law 11 and 12 that unappropriated water is available and that senior water rights will not be adversely affected. Both of these conclusions are supported by the lack of calls on the source and the lack of use of water management schemes by senior users. Conclusion of Law 11 concerning availability of unappropriated water is also supported by the physical availability of unappropriated water at the source established by Applicant's use of the system for two years. Conclusion of Law 12 concerning the lack of adverse effect is also supported by the fact that the Project is supplied by water sources other than Little Bitterroot Lake and water users in the area have rights to water from sources other than the Project. The Department agrees with the Hearing Examiner that these facts supported Conclusions of Law 11 and 12 and therefore will not modify the conclusions for the Final Order.

The Department will here comment further on what seems to be Objector's primary argument in this matter, i.e. that the Hearing Examiner illegally reduced the extent of Objector's pre-existing right. The Department does not agree the Hearing Examiner made a determination of pre-existing rights other than to accept the right as claimed by Objector in the adjudication. See Finding of Fact 9. The Hearing Examiner looked to other facts such as physical availability and the lack of calls on the source to



determine that unappropriated water is available and that prior appropriators would not be adversely affected.

Objector tries to equate this case with the Don Brown case. See United States v. DNRC, No. 50612, 1st Judicial District Court, June 15, 1987. Here, however, unlike in Don Brown, Objector has not established, in the adjudication or in these proceedings, the relationship between the extent of its claimed right and the amount of flow in the source. In fact, the flow of the Little Bitterroot River has not been measured. Nor is it known how much flow was diverted for irrigation prior to the impoundment at Little Bitterroot Lake. See Finding of Fact 12. Given this lack of information, and that Objector and its members draw from other sources and rights, Objector is left only with unsubstantiated argument that the amount of water flowing in the Little Bitterroot River, whatever it may be, is never sufficient to meet the need of the District, whatever it is, and that therefore the entire flow must belong to Objector. When this bare argument is weighed against the facts that water is physically available at the point of diversion, that there has never been a call on the Little Bitterroot River, and that the water users in the District have not resorted to the water management schemes that are usually in place during water shortages, the Hearing Examiner could only conclude as he did that water is available and that prior users would not be adversely affected.



Objector also excepted to Conclusions of Law 13 and 17.

Conclusion of Law 13 is a correct statement of the law and therefore will not be omitted as suggested by Objector.

Objector's exception to Conclusion of Law 17 has been answered in this Final Order by the discussion regarding Conclusion 11 and 12. Conclusion of Law 17 will not be changed.

Objector finally excepts to the Memorandum on protectable means of diversion attached with the Proposal. The Memorandum is neither a finding of fact nor a conclusion of law subject to review in these proceedings. Moreover, as stated in the Memorandum, the issue therein is not an issue reached in this case. Finally, the law as stated in the Memorandum is in agreement with the Department's interpretation of the Water Use Act. The Memorandum will not be changed.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 27, 1993, Proposal for Decision and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

<u>ORDER</u>

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit 75070-s76L is hereby granted to Mark E. Leatzow to appropriate 18 gallons per minute up to 0.25 acre-feet per year



of water from Little Bitterroot Lake, specifically 18 gpm up to 0.20 AF per year for domestic purposes and up to 0.05 AF per year for watering stock. The diversion shall be by means of a pump in Tract No. 2-7 of Government Lot 14 (generally in the SE\se\se\) of Section 6, Township 27 North, Range 24 West, Flathead County, Montana. The place of use for both purposes shall be in Tract No. 2-7 of Government Lot 14 (generally in the SE\se\) of Section 6, Township 27 North, Range 24 West, Flathead County, Montana. The period of appropriation and period of use shall be January 1 through December 31 of each year. The priority date shall be July 2, 1990.

- A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.
- B. The deadline for completion of this permit, and filing of the Notice of Completion of Permitted Water Development (Form 617) shall be December 31, 1994, verifying that the appropriation of water has been completed as permitted.
- C. This permit is specifically made subject to all prior reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this permit, do not create in the permittee any equity or vested right against the Tribes. The permittee is hereby notified that any financial

outlay or work invested in a project pursuant to this permit is at the permittee's risk.

Issuance of this permit by the Department shall not reduce a permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that a permittee may experience should they be unable to exercise this permit due to the future exercise of reserved water rights.

- D. The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. ADV-92-745 (Montana First Judicial District Court, Lewis and Clark County, Helena, filed May 15, 1992) and in Cause No. CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division, filed May 15, 1992) which cases are currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.
- E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.



NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this $\underline{\underline{\vartheta}}^{\text{th}}$ day of December, 1993.

Larry Holman, Chief
Water Rights Bureau
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6631

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this gray day of December, 1993, as follows:



Mark E. Leatzow Box 999 Marion, MT 59925

John C. Chaffin Office of the Solicitor U.S. Department of Interior P.O. Box 31394 Billings, MT 59107-1394

Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts P.O. Box 963 St. Ignatius, MT 59865

John E. Stults
Hearing Examiner
Department of Natural
Resources and Conservation
1520 East 6th Avenue
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Jon Metropoulos
Browning, Kaleczyc, Berry
and Hoven, P.C.
P.O. Box 1697
Helena, MT 59624

Charles F. Brasen, Manager Kalispell Water Resources Regional Office P.O. Box 860 Kalispell, MT 59903 (via electronic mail)

Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * * * *

IN THE MATTER OF THE APPLICATION) PROPOSAL FOR BENEFICIAL WATER USE PERMIT) FOR 75070-s76L BY MARK E. LEATZOW) DECISION

* * * * * * * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 a hearing was held in the above matter on August 6, 1991, in Kalispell, Montana, to determine whether the above Application should be granted to Mark E. Leatzow under the criteria in Mont. Code Ann. § 85-2-311(1).

APPEARANCES

Applicant appeared at the hearing on his own behalf. The U.S. Department of Interior Bureau of Indian Affairs (BIA) appeared at the hearing by and through John C. Chaffin, attorney with the Office of the Field Solicitor. Doug Oellermann, Agricultural Engineer with the Billings Area Office of the BIA, appeared as witness for Objector BIA. Appearing at the hearing as staff spokesman for the Department of Natural Resources and Conservation (Department) was Chuck Brasen, Manager of the Department's Kalispell Water Resources Regional Office.

Activity in this contested case was suspended from soon after the hearing until now because of uncertainties about proceeding while appeals of the jurisdiction issue are pending. On May 5, 1993, the uncertainty was cleared. In the Matter of Application for Beneficial Water Use Permit Nos.: 66459-76L, Ciotti, et al., ADV-92-745, Mont. 1st Jud. Dist. Ct., Minute Entry, May 5, 1993.





Objector Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (JBC) did not appear at the hearing. The record shows the Notice of Hearing was served upon both Objector JBC and its attorney, Jon Metropoulos, on May 31, 1991, by certified mail, return receipt requested. Return receipts were received by the Department with signatures indicating the Notices had been delivered and received. The Notice of Hearing set the hearing to begin at 9:00 a.m. The Hearing Examiner, Applicant, Objector BIA, and Department spokesman were present at the appointed time and place. At 10:10 a.m. the Hearing Examiner opened the hearing on the record. The hearing record was closed at 11:10 a.m. During that time, Objector JBC did not appear at the hearing. The Hearing Examiner has received no communication from Objector JBC subsequent to the close of the record.

The Hearing Examiner ruled at the hearing that Objector JBC was in default and that its objections be stricken. That ruling is hereby confirmed. Objector JBC is no longer a party to this matter and its objections are stricken. Mont. Admin. R. 36.12.208 (1991).

EXHIBITS

Objector BIA offered the following two exhibits which were accepted into the record without objection.

BIA Exhibit 1 is a 24 inch by 36 inch blue-line copy of a map entitled "The Flathead River System", showing major features of the Flathead River system, especially the Little Bitterroot River and reservoirs on or near it.



BIA Exhibit 2 consists of four pages. The first two contain information and statistics on the Camas Division of JBC's irrigation project. Page three contains information on smaller reservoirs in the Pend Oreille River basin in Montana, including the Camas area reservoirs. Page four is a photocopy of a map of what appears to be a portion of JBC's irrigation project.

The Hearing Examiner indicated at the hearing notice would be taken of the Department's May 7, 1990, Proposal for Decision In re Application 63023-s76L by Stan and Catherine Rasmussen. Objector BIA requested official notice be taken of the Department's records on Statement of Claim to Existing Water Right 76L-W190037-00 filed in the name of Flathead Irrigation Project by the Bureau of Indian Affairs and 76L-W166745-00 filed by JBC. Objector BIA also requested that the Hearing Examiner take official notice of the portion of United States v. DNRC, No. 50612, 1st Judicial District Court, June 15, 1987, cited by the United States Department of Interior in their Exceptions to the Proposal for Decision in Rasmussen, and that he take notice of In re Application 4501-s41E by North Boulder Drainage District, Final Order, December 4, 1981, Conclusion of Law 11, pages 9 and 10. These three requests were granted at the hearing, without objection.

Applicant and Objector BIA had opportunity prior to the hearing to review the Department's file on this application. The Hearing Examiner indicated at the beginning of the hearing the Department's file would be part of the record. No objection to





the file or any portion of it was expressed; therefore the entire Department's file is a part of the record.

PRELIMINARY MATTERS

At the beginning of their presentation of their case in chief, Objector BIA moved for dismissal of the Application on grounds the Department and the State of Montana lack jurisdiction over the waters proposed for appropriation. The motion was denied at the hearing. That ruling is confirmed here. It is based on <u>In re Applications 66459-76L</u> by Ciotti, 63574-s76L by Flemings, 63023-s76L by Rasmussen, 64988 by Starner, and G15152-s76L by Pope, Director's Order, April 30, 1990. <u>See</u> Finding of Fact 4 and Conclusion of Law 1.

FINDINGS OF FACT

- Application for Beneficial Water Use Permit No. 75070s76L was filed with the Department on July 2, 1990, at 12:10 p.m. (Department's file)
- 2. Applicant proposes to appropriate 18 gallons per minute (gpm) up to 1.55 acre-feet (AF) per year of water from Little Bitterroot Lake, specifically 18 gpm up to 1.5 AF per year for domestic purposes and up to 0.05 AF per year for watering stock. The point of diversion and place of use for both purposes would be by means of a pump in Tract No. 2-7 of Government Lot 14 (generally in the SE\sextsize) of Section 6, Township 27 North, Range 24 West, Flathead County, Montana. The period of appropriation and use would be January 1 through December 31 of each year.



- 3. Pertinent portions of the Application were published in the Kalispell <u>Daily Inter Lake</u>, a newspaper of general circulation in the area of the proposed source, on August 16, 1990. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department's file)
- 4. The Department received objections filed against this Application. The objections were filed by BIA and by JBC. JBC's objections were subsequently stricken. See page two above.

Objector BIA bases their objection to this proposed appropriation on their contention that the State of Montana lacks jurisdiction over lands within or water of the Flathead Indian Reservation. They also contend no water is available for appropriation from the proposed source during the proposed period of diversion, and that water rights of the United States and the Confederated Salish and Kootenai Tribes would be adversely affected by making the proposed volume unavailable to them and by being part of a cumulative reduction in water available for their system. (Department's file)

5. Applicant's system of diversion, conveyance, and use is already in place. The system consists of a submersible pump in Little Bitterroot Lake which pumps the water up to a 500 gallon storage tank approximately 400 feet above the lake. A jet pump then pumps the water to Applicant's home by passing it through a pressure tank.



The intake for the diversion system sits on the bottom of Little Bitterroot Lake. It is approximately twenty to twenty-five feet below the surface of the lake when the water level in the lake is high. At low water, as has been experienced in the last few years, the intake is approximately ten feet below the surface of the lake.

Applicant has lived on Little Bitterroot Lake for four years. The system has been operated for at least two years and has performed satisfactorily. (Department's file and testimony of Mark Leatzow)

- 6. Applicant owns the property on which the proposed appropriation would be put to use. The use for domestic purposes would serve his family of four people. The family lives on the property and would use the water year round. The use for stock watering would be for two horses. (Department's file and testimony of Mark Leatzow)
- 7. Applicant's proposed volume limit for the domestic portion of this appropriation is 1.5 AF per year. This figure was supplied to Applicant by Department staff as estimation of a reasonable maximum limit of water use for domestic purposes.

During the period of past use, the amount of water diverted daily has been approximately 167 gallons. This was determined both through estimates of system operating capacity and the amount of time one filling of the storage tank would last. The 500 gallons in the storage tank usually last three to five days. Applicant does not foresee significantly increasing the amount of





water used for domestic purposes. There is no use for lawn or garden.

Applicant's past use of water has been and the anticipated future use of water would be 0.20 AF per year. This figure has been determined as follows: 167 gallons per day times 365 days per year, divided by 325,851 gallons per AF; then rounded to the nearest larger full tenth. (Department's file and testimony of Mark Leatzow and Chuck Brasen)

- 8. Applicant's proposed volume limit for stock watering is 0.05 AF per year. This figure was supplied to Applicant by Department staff as estimation of a reasonable maximum limit of water use by two horses, which is the amount of stock Applicant intends to obtain (see Finding of Fact 6). (Department's file and testimony of Mark Leatzow and Chuck Brasen)
- 9. Objector BIA has filed Statement of Claim for Existing Water Right 76L-W190037-00 for waters of Little Bitterroot Lake in the amount of 10,000 cubic feet per second up to a total volume of 4,237,200 AF per year. This claimed appropriation is for irrigation served by the Flathead Irrigation District delivery system. The claim includes reference to Little Bitterroot Lake as a storage facility for this water right. (BIA Exhibit 2 and testimony of Doug Oellermann)
- 10. Little Bitterroot Lake has an impoundment structure at its outlet which raised the surface of the water to create 26,400 AF of active storage. This volume of active storage is a part of the Camas Division of the Flathead Irrigation District which



- supplies water to 13,162 acres. The district's reservoirs, including the active storage at Little Bitterroot Lake, have never all filled to capacity in the same season. Little Bitterroot Lake only filled twice in the twenty-six years from 1962 through 1988. The District has never been able to provide the amount of irrigation water per acre identified as full service irrigation for all of the potentially irrigable acres within its boundaries. (BIA Exhibit 2 and testimony of Doug Oellermann)
- 11. The Flathead Irrigation District, Camas Division, is not the sole source of water for the 13,162 acres within its boundaries. Many rights to divert water from the Little Bitter-root River and other sources for irrigation of lands within the boundaries of the Camas Division of the Flathead Irrigation District are on record as being owned by private individuals. (Department's records and testimony of Doug Oellermann)
- 12. The Camas Division of the Flathead Irrigation District is not solely dependant upon the reservoirs on its system for water to service the acreage within its boundaries. The District has water rights to the natural flow of the Little Bitterroot River. The amount of natural flow in the river is not known. It has not been gauged. The amount of natural flow which has been diverted to irrigation without prior impoundment is not determinable from the record in this matter. (Department's records and testimony of Doug Oellermann)
- 13. Neither the Flathead Irrigation District or Objector
 BIA has ever called for water from Little Bitterroot Lake, i.e.,



- it have never asked an appropriator with a water right junior in priority to its right to stop diverting. (Testimony of Doug Oellermann)
- 14. There is no evidence in the record of any owner of a senior water right on the Little Bitterroot River calling for water or requesting a junior to cease diverting.
- 15. There is no evidence in the record the Flathead Irrigation District, Objector BIA, or other water right owner has entered into any rotation schedule or other appropriation management scheme for responding to shortages of water in the Little Bitterroot River system.
- 16. There are no permits issued to appropriate waters from Little Bitterroot Lake or River for which the project is still pending or planned. (Department records)
- 17. There have been no reservations of water granted for any source in the Kalispell Water Resources Division Regional Office area, which contains the Little Bitterroot Lake and River, and their tributaries. (Department records and testimony of Chuck Brasen)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1989); *In re* Applications 66459-76L by Ciotti, 63574-s76L by Flemings, 63023-s76L by Rasmussen, 64988 by Starner, and G15152-s76L by Pope, Director's Order, April 30, 1990.





- 2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, 4, 9, and 10.
- 3. The 1993 Legislature amended Mont. Code Ann. § 85-2-311 to revise and clarify the burdens and standards of proof under which applications for beneficial water use permits are processed. It also amended the criteria applicants must prove in order for the Department to issue a beneficial water use permit. It added three statments requiring applicants, under certain circumstances, to address water quality impacts which would result from their proposed appropriations. The amendments apply retroactively to all applications pending on April 16, 1993, the effective date of the act. The above-entitled application was pending on April 16, 1993; therefore, the amendments apply to this application. 1993 Mont. Laws 370 and 460.
- 4. In accordance with 1993 Mont. Laws 370 and 460, the Department must issue a beneficial water use permit if the applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) are met:
 - (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;



- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
- (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;
- (g) the water quality of a prior appropriator will not be adversely affected;
- (h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
- (i) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- 5. An applicant is required to prove the criteria in subsections (1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable may not be met. For the criterion set forth in subsection (1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection. No valid objections to this application were filed relative to subsections (1)(g), (1)(h), or (1)(i). See Finding of Fact 4. Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (1)(h), and (1)(i). 1993 Mont. Laws 460 § 1.
 - 6. To meet the preponderance of evidence standard in



- Mont. Code Ann. § 85-2-311(1), the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies. 1993 Mont. Laws 370.
- 7. Applicant proved by a preponderance of substantial credible evidence that Applicant has possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 2 and 6. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(f) has been met.
- 8. Applicant proved by a preponderance of substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 5 and 7. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(c) has been met.
- 9. The proposed uses of water, domestic and stock watering purposes, are beneficial uses. Mont. Code Ann. § 85-2-102(2)(a) (1989).

Beneficial use is the measure and limit of a water right.

See McDonald v. State 220 Mont. 519, 722 P.2d 598 (1986). A

permit cannot be issued for more water than can be beneficially used. Mont. Code Ann. § 85-2-312(1) (1989). Applicant's proposed maximum limit on the volume of water to be used for stock watering purposes under this appropriation matches the amount of





water projected to be beneficially used by Applicant. <u>See</u>
Finding of Fact 8. Applicant's proposed maximum limit on the
volume of water to be used for domestic purposes under this
appropriation exceeds the amount of water projected to be beneficially used by Applicant. <u>See</u> Finding of Fact 7.

Therefore, while the volume limit for stock watering may be permitted as requested, the amount of water permitted to be diverted for domestic use under this appropriation must not be greater than 0.20 AF per year, and the total volume permitted for all uses under this appropriation may not be greater than 0.25 AF per year.

The Department may modify an application if it prepares a statement of its opinion and the reasons therefore. Mont. Code Ann. § 85-2-310(2) (1989). The foregoing discussion gives the reasons why the volume must be reduced. In addition, a reduction does not suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed; it is the opposite. Reduction of the volume of water to be appropriated would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc.; In re Application No. 50272-q42M by Joseph F. Crisafulli.

At a volume limited to 0.25 AF per year, the proposed appropriation would not be wasteful and thus would be beneficial.

This being so, the criterion in Mont. Code Ann. § 85-2-311(1)(d) has been met.

- except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989). Applicant diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. See Findings of Fact 5 and 7. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town.
- 11. Applicant has shown that there are unappropriated waters in the source of supply at the proposed point of diversion in the amount Applicant seeks to appropriate. Applicant has provided substantial credible evidence the amount of water proposed for appropriation is physically available at the proposed point of diversion during the proposed period of appropriation. See Findings of Fact 5, and 7. There is no record of constant calls for water or annually-imposed voluntary rotation schemes during this period, nor is there record of annual water



availability and use management by water users. <u>See</u> Findings of Fact 13, 14, and 15. There being water physically available during the proposed period of use which is not destined to prior appropriators, the criterion in Mont. Code Ann. § 85-2-311(1)(a) (1991) has been met. <u>See In re Application 70511-s76LJ by Winter Sports, Inc.</u>; <u>see also In re Application 24921-s41E by Remi and Betty Jo Monforton</u>.

Objector alleges Applicant's appropriation of water 12. would adversely affect its water rights by reducing the amount of water ultimately supplied to the acreage in its service area. Objector's evidence of alleged adverse effect is it has never impounded all the water in system that they claim they have a right to. See Findings of Fact 9 and 10. Objector provided no testimony or evidence water shortages have occurred at its facilities or the facilities of others, i.e., there is no evidence the source has ever been called for water or that a water right owner has ever had to exercise their priority in any way. See Findings of Fact 13, 14, and 15. In addition, there are factors in the management of the Camas Division of the Flathead Irrigation District, and in the entitlements to water in the drainage basin, that make it less likely Objector has ever experienced a shortage that a call for water would have alleviat-See Findings of Fact 9, 10, 11, and 12.

Objector's senior status as a prior appropriator does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the decrease of stream



flow or the lowering of a water table, if the prior appropriator can reasonably exercise its water rights under the changed conditions. Mont. Code Ann. § 85-2-401 (1991).

There being no other allegations of adverse effect on the record and no adverse effect to prior appropriators being on the face of the record, the preponderance of the evidence in the record is the water rights of prior appropriators will not be adversely affected. Therefore, it is concluded the criterion in Mont. Code Ann. § 85-2-311(1)(b) is met.

appropriation may be part of a cumulative depletion effect which may be ongoing and insidious, or which may be incipient and initiated by the proposed appropriation. See Finding of Fact 4. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations.

See In re Application 60117-g76L by William C. Houston; In re Application 70584-g41B by Petersen Livestock.

If Objector wishes to seek answers to the questions raised concerning possible cumulative effects, the law provides a mechanism for pursuing answers and controls through Mont. Code Ann. § 85-2-319 (1991).

14. Applicant proved by substantial credible evidence the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. See Conclusion of Law 12; Finding of Fact 16 and



- 17. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(e) has been met.
- 15. It must be a condition of issuance of a permit for the proposed appropriation that a Notice of Completion of Permitted Water Development (Form 617) must be filed with the Department by a certain date verifying that the appropriation of water has been completed as permitted. 1993 Mont. Laws 370 § 9. The project is already in place and functioning; therefore, the date can be in the earliest procedural cycle allowing for all stages of permitting, etc., i.e., December 31, 1994. See Finding of Fact 5.
- 16. The Department has the authority to impose terms, conditions, restrictions, and limitations the Department considers necessary to satisfy the criteria in Mont. Code Ann. § 85-2-311(1). Mont. Code Ann. § 85-2-312(1) (1991).
- 17. Applicant having proven the application meets the statutory criteria, and conditions having been identified which ensure the project as operated will conform to the statutory criteria, a permit must be issued. Mont. Code Ann. §§ 85-2 311(1) and 312(1) (1991).

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use

Permit 75070-s76L is hereby granted to Mark Leatzow to appropriate 18 gallons per minute up to 0.25 acre-feet per year of water from Little Bitterroot Lake, specifically 18 gpm up to 0.20 AF per year for domestic purposes and up to 0.05 AF per year for



watering stock. The diversion shall be by means of a pump inTract No. 2-7 of Government Lot 14 (generally in the SE\seta) of
Section 6, Township 27 North, Range 24 West, Flathead County,
Montana. The place of use for both purposes shall be in Tract
No. 2-7 of Government Lot 14 (generally in the SE\seta) of Section
6, Township 27 North, Range 24 West, Flathead County, Montana.
The period of appropriation and period of use shall be January 1
through December 31 of each year. The priority date shall be
July 2, 1990.

- A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.
- B. The deadline for completion of this permit, and filing of the Notice of Completion of Permitted Water Development (Form 617) shall be December 31, 1994, verifying that the appropriation of water has been completed as permitted.
- C. This permit is specifically made subject to all prior reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this permit, do not create in the permittee any equity or vested right against the Tribes. The permittee is hereby notified that any financial outlay or work invested in a project pursuant to this permit is at the permittee's risk.

Issuance of this permit by the Department shall not reduce a permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that a permittee may experience should they be unable to exercise this permit due to the future exercise of reserved water rights.

- D. The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. ADV-92-745 (Montana First Judicial District Court, Lewis and Clark County, Helena, filed May 15, 1992) and in Cause No. CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division, filed May 15, 1992) which cases are currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.
- E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may



Tile exceptions with the Hearing Examiner. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

Any exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exceptions and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 27 day of August, 1993.

John E. Stults, Hearing Examiner Department of Natural Resources and Conservation 1520 East 6th Avenue Helena, Montana 59620-2301 (406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this day of August, 1993, as follows:

Mark E. Leatzow Box 999 Marion, MT 59925

John C. Chaffin Office of the Solicitor U.S. Department of Interior P.O. Box 31394 Billings, MT 59107-1394

Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts P.O. Box 963 St. Ignatius, MT 59865 Jon Metropoulos
Browning, Kaleczyc, Berry
and Hoven, P.C.
P.O. Box 1697
Helena, MT 59624

Charles F. Brasen, Manager Kalispell Water Resources Regional Office P.O. Box 860 Kalispell, MT 59903 (via electronic mail)

Cindy G. Campbell
Hearings Unit Legal Secretary

MEMORANDUM

The Department must not issue a permit for more water than can be beneficially used. Mont. Code Ann. § 85-2-312(1) (1991). The limit of a water right is beneficial use. See McDonald v. State 220 Mont. 519, 722 P.2d 598 (1986). Under these tenets, no water right would vest from a permit issued to Applicant Leatzow for his limited domestic use if the volume permitted were the entire volume of Little Bitterroot Lake just so he could pump off the top and not have to expend the extra cost of pumping from a lower depth.

A significant portion of Objector BIA's arguments were focussed on the question of a water right for maintaining the surface level in Little Bitterroot Lake at full pool to facilitate releases from the active storage reservoir. This is the type of water right Objector BIA alleges JBC has. Although this

issue is not reached in this case, Objector's efforts, and the potential for the issue to be raised again in the future, compel some discussion here.

The concept of protectable means of diversion has had significant definition and clarification in Department orders. Artesian flow is not protectable. A shallow water table is not protectable. It is a matter of degree as to what is protectable. The means of diversion must be reasonably efficient, which involves an assessment of the cost of maintaining and operating the diversion in relationship to customary costs of such an enterprise and the anticipated benefits. Crudely put, whether it is affordable is an element of the analysis. There is no evidence in the record that JBC could not reasonably exercise their water right by improving their ability to obtain their entitlement of water from the natural levels of Little Bitterroot Lake, nor is there evidence in the record that they cannot afford to improve their ability to do so, whether by reconstructing their outlet structure or by pumping when necessary.

State ex rel. Crowley v. District Court, 108 Mont. 89, 88

P.2d 23 (1939) and In re Application 4501-s41E by North Boulder

Drainage District (1981) both involve situations where the amount of water being protected to facilitate the operation of the reasonable means of diversion was minimal. The court in Crowley speaks of a flow of waters so reduced by one party that the other party could not divert water from the source without "the construction of a new diversion system so that any amount of water,





however slight, ... could be reached ... The prior appropriator cannot be compelled to incur expenses in an unreasonable and excessive amount. The question still remains, however, whether the JBC has a right to all the water in Little Bitterroot Lake for the sake of it's existing diversion system thus leaving no unappropriated water available for future appropriations, not even 0.25 acre-feet. Objector BIA contends there is a water right to the natural volume of Little Bitterroot Lake for conveyance of their impounded water to their outlet structure.

In re Application 71133-q41B by Hildreth (1990) is a recent case in a line of Department decisions interpreting how § 85-2-401(1) relates to the rights prior appropriators may have to their historic reliance on a surface manifestation of groundwater or artesian pressure as a delivery mechanism in their diversion Hildreth carries forward a well established principle that an appropriator is not entitled, by priority, to command the whole of a source merely to facilitate his taking a fraction of the whole to which he is entitled. See City of Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961); State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939); Schodde v. Twin Falls Land & Co., 224 U.S. 107 (1912). The facts in the line of cases behind <u>Hildreth</u> all pertain to an unreasonably inefficient means of diversion wherein a large percentage of the water at the point of appropriation is a necessary element of the historical means of acquiring the portion which the prior appropriator diverts to their beneficial use. In Schodde the





entire flow of a stream had been integrated into the means of diversion because the means of diversion was a water wheel that required the force of the full flow to operate. Hildreth cites the previous Department decision In re Application 31441-g41R by Jim McAllister (1985) where the appropriator was relying on the artesian force of an underground water resource to lift the water to the surface at the point where they conveniently took control of it. These factual situations clearly require questioning the reasonableness of allowing the prior appropriators to extend the protections inherent in their water rights to include the use of the uncontrolled existence of the water resource as their method of diversion. They are all relying on the force of an uncontrolled body of water to act as the element of force or lift necessary for their historical means of diversion to function.

Surely no one would consider it reasonable to issue a water right to this applicant for the entire volume of Little Bitter-root Lake, apparently tens of thousands of acre-feet, so he could pump 0.25 AF from the top of the lake rather than having to pump from the bottom. Reasonable limits to the amount of water which any one use can command has long been a fundamental principal of water use in Montana.

"We say within reasonable limits, for this right to water ... is not unrestricted. It must be exercised with reference to the general conditions of the country and the necessities of the people, and not so as to deprive the whole neighborhood or community of its use, and not to vest an absolute monopoly in a single individual." Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416 (1888).